Peck, 2 Duer, 90. But this doctrine has great faults. Such an agreement does not fairly mean that property in the whole wall shall be in the builder, nor can this property pass to a subsequent user by the mere payment of money unless regarded as personal property, which the agreement certainly does not intend. If liability is to exist, some better principle for its support must be found.

It is submitted that the covenant may fairly be held to run with the land where the agreement has regard to any wall that may be built, and not to a specific wall which already stands or is about to be built. Such a wall vitally affects the improvement of the land, for it encourages the adjoining owner to build, knowing he may very probably be repaid half the expense of his wall. When a wall is once built, the covenant does not pass into a mere contingent claim for money, as it is a promise, not to pay for half of that particular wall built, but for any wall which is used. It thus tends to encourage the building of a second wall should the first be destroyed. Nor should it come under the rule that covenants imposing a burden do not pass to subsequent vendees, a doctrine to protect vendors from disadvantageous incumbrances, for though it imposes an obligation to pay money under certain circumstances, it may yet on the whole be considered to a subsequent vendor's advantage, as it tends to the establishment of a permanent party wall of which he may make use on payment of half value. Thus it seems that as the covenant affects the land, and is not properly a burden, it can be held to run. Where, on the other hand, the covenant refers to a specific wall about to be built, on the completion of the wall it no longer affects the land. It becomes a mere collateral claim to pay money for the use of the wall, since it does not apply to the building of a second wall, should the first be destroyed. Such a covenant, therefore, after the completion of the wall, should not run to the vendees of either lot. The agreement in the principal case, however, seeming to contemplate no particular wall, ought properly to be regarded as running with the land, and as most party wall agreements are similarly framed, the desired result of passing the covenants to subsequent purchasers could thus, in such cases, be reached, with no departure from principle.

RECENT CASES.

AGENCY — LIABILITY OF PRINCIPAL — SCOPE OF AGENCY. — A telegraph operator in the employ of the defendant forged and transmitted a fraudulent message to the plaintiff. *Held*, that the defendant is liable for losses occasioned to the plaintiff thereby. *Bank of Palo Alto* v. *Pacific Postal Tel. etc. Co.*, 103 Fed. Rep. 841 (Cir. Ct., Cal.).

It is clear that in general a principal is only liable for those torts of his agent which he has expressly authorized, or which are the result of acts reasonably incidental to the agent's employment. Moreover, this liability is entirely independent of the agent's motive. *Howe* v. *Newmarch*, 12 Allen, 49. Outside of these limits, the agent alone is responsible for his wrongful acts. *Rounds* v. *Delaware, etc. R. R. Co.*, 64 N. Y. 129. Obviously a telegraph operator has no express authority to transmit fraudulent messages, and it seems equally evident that such acts cannot reasonably be a proper method of performing his duties. Accordingly, the principal case holds the master for what is apparently a purely personal act of his servant. This result is, however, not without some support by the authorities, where, as here, the principal is engaged in serving the public under such circumstances that his agent's acts must of necessity

be implicitly relied upon by the public. *McCord* v. *Western, etc. Tel. Co.*, 39 Minn. 181. These decisions can be supported, if at all, only on broad grounds of policy.

BANKRUPTCY — ASSIGNMENT UNDER STATE LAW — PREFERENCES. — After the National Bankruptcy Act of 1898, an assignment in insolvency was made to the plaintiff as trustee according to the Connecticut insolvency law. *Held*, that the plaintiff has no interest in the insolvent estate which enables him to set aside a fraudulent preference. *Ketchum* v. *McNamara*, 46 Atl. Rep. 146 (Conn.).

The court rests the case on the ground that the assignment to the plaintiff, being part of a proceeding under the Connecticut insolvency law, which had been superseded by the Bankruptcy Act, was void. *Harbaugh* v. *Costello*, 184 Ill. 110. It would seem, however, that though useless for purposes of proceeding under the Connecticut insolvency law, the transaction should still pass a good legal title as a common law assignment. *Boese* v. *King*, 108 U. S. 379. Nevertheless, the decision is correct. A preference is not a fraudulent conveyance within the statute of Elizabeth, *Cock* v. *Goodfellow*, 10 Mod. 489; and, therefore, the assignee has no power to attack it except under some operative bankruptcy or insolvency law. Since the plaintiff here claims to act only under the superseded state law, he clearly has no such power.

BANKRUPTCY — EXEMPTION FROM INVOLUNTARY BANKRUPTCY — FARMER. — The insolvent was engaged in raising cattle and hogs for the market, feeding them principally from grain and hay grown on his own land. *Held*, that he is a person "engaged chiefly in farming," and so cannot be adjudged an involuntary bankrupt. *Re Thompson*, 102 Fed. Rep. 287 (Dist. Ct., Iowa).

The Bankruptcy Act, § 4 b, exempts from liability to involuntary proceedings persons "engaged chiefly in farming or the tillage of the soil." This clause has recently been interpreted to mean those whose chief occupation is farming and tilling the soil. *Re Taylor*, 102 Fed. Rep. 728, 730. The principal case, however, holds that one engaged in the business of raising and selling stock, while not a tiller of the soil, is nevertheless included in the class of farmers, and so cannot be thrown into involuntary bankruptcy. The decision seems unfortunate. In England, a farmer dealing in cattle to a greater extent than is incidental to farming is considered a trader, *Ex parte Gibbs*, 2 Rose, 38; and under our Act of 1847, one engaged in a business requiring the purchase of articles to be sold again was a trader. *Wakeman* v. *Hoyt*, Fed. Cas. No. 17,051. An opposite construction, therefore, might well have been reached in this case, especially since the present act is remedial in its nature, and should be construed where possible so as to promote justice. *Re Luckhardt*, 101 Fed. Rep. 807, 809.

BANKRUPTCY — JURISDICTION — PLEADING. — The Bankruptcy Act of 1898, § 4 b, provides that "any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil," may be adjudged an involuntary bankrupt. *Held*, that a petition in involuntary bankruptcy which fails to show that the debtor is not within the excepted classes is demurrable. *Re Taylor*, 102 Fed. Rep. 728 (C. C. A., Seventh Cir.).

The opposing view, that such facts are merely matters of personal defence to be set up in the answer, has some support. LOWELL, BANKR. 473. Likewise the prescribed form for a creditor's petition (Form No. 3) makes no provision for such an allegation. However, according to the principal case, the question is jurisdictional rather than personal, and the allegation in question is thus necessary to bring the alleged bankrupt within the terms of the statute. This decision is in accord with the general rule of pleading statutes, that if the exception is in the form of a proviso, it may be set up as defence, *State* v. *Abbott*, 31 N. H. 434; but where it is incorporated into the body of the clause, it must be expressly negatived by the pleader. *Commonwealth* v. *Hart*, 11 Cush. 130, 134.

BANKRUPTCY — PREFERENCES — PROVABLE CLAIMS. — A had two separate and distinct claims against a bankrupt, and on one of them he had received a preference. *Held*, that he cannot prove the other against the bankrupt's estate until he surrenders the preference. *In re Rogers' Milling Co.*, 102 Fed. Rep. 687 (Dist. Ct., Ark.).

The Bankruptcy Act of 1898, § 57 g, provides that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." Clearly, this clause applies where a creditor, having actually although innocently, received a preference by the partial payment of a debt, seeks to

prove the remainder of the same claim. *Strobel & Wilkin Co.* v. *Knost*, 99 Fed. Rep. 409; *In re Ft. Wayne Electric Corp.*, 99 Fed. Rep. 400. The principal case applies the provision to any claim, though separate and distinct from the one preferred. The result reached by this construction is just and equitable, for the object of the act is to secure an equal distribution of the bankrupt's estate among all the creditors in proportion to their respective claims. If, therefore, the preferred creditor asks the aid of the court to give him a further share of the estate, he must be content to place himself upon an equality with the other creditors. That can only be done by a surrender of whatever preferences he has received. The same construction was adopted in a previous case under very similar facts. *In re Coulrain*, 97 Fed. Rep. 923.

BILLS AND NOTES — GUARANTY — RIGHTS OF INDORSEE. — The defendants signed, on the back of a promissory note to which they were strangers, the following agreement: "We hereby guarantee the payment of within note." *Held*, that a subsequent indorsee of the note cannot sue in his own name on the guaranty. *Edgerly* v. *Lawson*, 57 N. E. Rep. 1020 (Mass.).

It has been held by considerable authority that such a guaranty, written on a negotiable instrument, is itself negotiable. *Hopson* v. *Spring Co.*, 50 Conn. 597; *Ellsworth* v. *Harmon*, 101 Ill. 274. Similarly, if a mortgage is given as security with a note, the mortgage passes as an incident to the note. *Carpenter* v. *Logan*, 16 Wall. 271. This case, however, is distinguishable, because otherwise the mortgage is valueless, while in the principal case the indorsee of the note can of course sue on the guaranty in the name of his assignor. As a new proposition, there is much to be said for the position that such a guarantor, having agreed with reference to the payee "or order," should be held to the terms of his agreement. As the law stands, however, the negotiability of bills and notes themselves is an exception based on commercial necessity, and it seems that there is no present necessity for the extension of the exception to such guaranties. The principal case, moreover, is in accord with the great weight of authority. *True* v. *Fuller*, 21 Pick. 140; *Tinker* v. *McCauley*, 3 Mich. 188.

CONSTITUTIONAL LAW — COMMERCE CLAUSE — FISH AND GAME LAW. — *Held*, that a statute prohibiting all sales of game within the state is a regulation of interstate commerce and therefore void. *In re Davenport*, 102 Fed. Rep. 540 (Cir. Ct., Wash.).

Held, that a statute prohibiting the possession of certain game or fish during the close season is to be construed as not intended to cover the case of fish or game imported from another state, and is therefore valid. *People* v. *The Buffalo Fish Co.*, 164 N. Y. 93. See NOTES.

CONTRACTS — CONTRACT FOR SERVICES — WRONGFUL DISCHARGE. — The plaintiff, employed by defendant company for one year at a weekly salary, was wrongfully discharged. Two weeks later, he brought an action for his salary for the two weeks, and recovered. At the expiration of the year, he sued for salary accruing since the previous action. *Held*, that the former action is no bar, as the plaintiff's willingness to serve was equivalent to actual service, and he might have brought a separate suit for each week after his discharge. *Allen* v. *Colliery Engineers' Co.*, 46 Atl. Rep. 899 (Pa.). See NOTES.

CORPORATIONS — CITY ORDINANCE — ENCOURAGING MONOPOLY. — A city ordinance provided that all contracts for city printing should be awarded to union printers. The charter did not require that contracts be let to the lowest bidders. *Held*, that the ordinance is void as encouraging monopoly, and that a tax-payer is entitled to an injunction against its enforcement. *Atlanta* v. *Stein*, 36 S. E. Rep. 932 (Ga.).

There seems to be little or no authority on exactly the point here involved, but the case most nearly parallel reaches the same result. *Adams* v. *Brennan*, 177 Ill. 194. It is well settled that where a matter is left to the discretion of the municipal authorities, the court will not interfere with their action unless their discretion is manifestly abused. *Cleveland, etc. Co.* v. *Board of Fire Com.*, 55 Barb. 288. But it is justly argued in the principal case that the ordinance in question effectually prevented the free exercise of discretion which is the duty of municipal authorities, and by restricting competition tended directly to raise the price which the tax-payers must pay for the city printing. From this the conclusion is drawn that the city council had no authority to pass an ordinance so injurious to the public interest. The decision is therefore only an extension of the familiar principle which allows a tax-payer to stop

by injunction an unwarrantable expenditure of the public funds. *Avery* v. *Job*, 25 Ore. 512. Altogether, the principal case establishes a desirable precedent.

CORPORATIONS — MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS. — *Held*, that a municipal corporation is liable for injuries caused by the negligence of its agents. *Rhobidas* v. *Concord*, 47 Atl. Rep. 82 (N. H.). See NOTES.

CRIMINAL LAW — POSSESSION OF STOLEN GOODS — PRESUMPTIONS. — On an information for burglary, the trial court charged that the possession of stolen property immediately after the theft is sufficient to warrant a conviction for larceny, unless the other evidence so far overcomes the presumption thus raised as to create a reasonable doubt of the person's guilt. *Held*, that the charge is erroneous, since the effect of such evidence is solely for the jury. *Williams* v. *State*, 83 N. W. Rep. 681 (Neb.).

In early times a person found with stolen goods immediately after the theft was liable to summary punishment without the benefit of an ordinary trial. THAYER, PRELIM. TREAT. EV. 328. More recently such possession was considered a presumption of guilt, — conclusive unless satisfactorily explained. 2 EAST, P. C., c. 16, § 93. At the present day the weight of authority is in accord with the principal case in holding that the question as to what weight shall be attached to the fact of recent possession is solely for the jury. This fact is sufficient to justify an inference of guilt, but is not enough to create a legal presumption against the accused. *State* v. *Hodge*, 50 N. H. 510. In some states, however, it is still held to create a presumption of guilt, calling for explanation. *Smith* v. *People*, 103 Ill. 82. While the modern rule must be acknowledged to be judicial legislation, it is clearly a justifiable change; for the evidential value of recent possession can more properly be determined by the jury than by a fixed rule of law.

EQUITY — ADJOINING LANDOWNERS — LIABILITY FOR ENCROACHMENT. — The upper part of a wall of the defendant's building overhung the roof of a building on the plaintiff's land by a few inches. The encroachment was high in the air, and the cost of removing the wall would be very large without conferring upon the plaintiff any corresponding benefit. *Held*, that the defendant is liable for all damages which he may have caused, and that he will be enjoined from continuing the encroachment whenever the plaintiff shall desire to build. *Crocker* v. *Manhattan Life Ins. Co.*, 31 N. Y. Misc. 687 (Sup. Ct., Spec. Term).

Courts of equity are much more reluctant to compel a man to undo a tort than to compel him to perform a duty. Nevertheless, in strong cases of continuing trespass, accompanied by substantial damages and in no way offset by benefits, an injunction will be granted. *Garvey* v. *Long Island R. R. Co.*, 159 N. Y. 323. Yet the injunction should not issue where it would cause a greater injury than it is intended to remedy. *McSorley* v. *Gomprecht*, 30 Abb. N. Cas. 412. One practical reason for this result is the fact that the decree if granted would in most cases probably never be carried out, but would be used to extort an unreasonable amount from the defendant for the property taken. Equity will, however, in such cases give damages in order to settle the whole question in one suit. *McSorley* v. *Gomprecht*, *supra*. Still the decree in the principal case is clearly erroneous. If the injury to plaintiff is sufficiently serious to justify an injunction when he wishes to build, the decree should give it at once. Otherwise the relief should be confined to damages.

EQUITY — EXECUTION SALE — PURCHASE BY ATTACHING CREDITOR. — An attaching creditor bid in the property levied on at the execution sale. *Held*, that he is not a purchaser for value without notice. *Murphy* v. *Plankington Bank*, 83 N. W. Rep. 725 (S. D.).

The court throughout the case speaks of the party under whom the plaintiff claims as an attaching creditor. It is true, if his only claim had been by virtue of an attachment, the case would be clearly correct, since, according to all the authorities, an attaching creditor is not a purchaser for value. *Whitworth* v. *Gangain*, 3 Hare, 416. But it seems to have been entirely overlooked that in the present case an execution sale had actually taken place in pursuance of the attachment, and that a sheriff's deed had been issued. Under these circumstances, it cannot be questioned that a *bona fide* purchaser is not affected by unrecorded rights existing against the judgment debtor. *Milner* v. *Hyland*, 77 Ind. 458. It is equally clear, moreover, that a judgment creditor thus buying at the execution sale should be in no worse position than a third person. *Riley* v. *Martinelli*, 97 Cal. 575. *Contra*, *Orme* v. *Roberts*, 33 Tex.

768 (*semble*). He has in good faith acquired a good legal title for which he paid value, and there is no equitable ground for disturbing his position.

EQUITY — INJUNCTION — CRIMINAL PROCEEDINGS. — Plaintiff asked an injunction to restrain the enforcement against him of a penal municipal ordinance, on the ground that the ordinance was unconstitutional. *Held*, that courts of equity will not enjoin criminal proceedings. *Bainbridge* v. *Reynolds*, 36 S. E. Rep. 935 (Ga.). See NOTES.

EQUITY — PROPERTY — EQUITABLE EASEMENTS. — *Held*, that an agreement in a deed that the grantor would keep a water-wheel in repair and furnish power for the benefit of the land granted makes an equitable easement binding on the grantor's vendee who takes with notice. *Gould* v. *Partridge*, 52 N. Y. App. Div. 40.

In at least one case the English courts enforced a burden imposed on certain land for the benefit of other land where it required the owner of the quasi-servient estate to do an affirmative act. *Cooke* v. *Chilcott*, 3 Ch. D. 694. Later decisions, however, enforce only restrictive burdens. *Austerbury* v. *Oldham Corporation*, 29 Ch. D. 750; *Haywood* v. *New Brunswick Bldg. Assoc.*, 8 Q. B. D. 403. In this country there is a tendency to adopt the broader rule of the earlier English case. *Whittenton Mfg. Co.* v. *Staples*, 164 Mass. 319, 327 (*semble*). It is always held that equitable easements will be enforced only where there is notice. *Tulk* v. *Moxhay*, 2 Ph. Ch. 774; *Tallmadge* v. *East River Bank*, 26 N. Y. 105. Hence the true basis of the doctrine seems to be the familiar equitable principle that a purchaser acquires property subject to those equities of which he has notice. In this view the grounds for equitable enforcement are the same whether the burden is affirmative or merely restrictive. The principal case is therefore correct. Nevertheless, the restrictive English rule may be followed in some jurisdictions upon the ground that it is contrary to public policy to burden successive owners with the performance of positive acts that are beneficial only to others.

EQUITY — PROPERTY — FRAUDULENT CONVEYANCE. — A debtor, in order to defraud his creditors, conveyed land to his mother, who paid a fair value and had no knowledge of the fraud. The conveyance was unsolicited by the mother. *Held*, that the creditors have a right to redeem the property by repaying the consideration. *Rummonth* v. *White*, 47 Atl. Rep. 1 (N. J., Ch.).

The general rule is that creditors cannot attack a fraudulent conveyance, as against a purchase for value without notice. *Anderson* v. *Roberts*, 18 Johns. 515; *Comey* v. *Pickering*, 63 N. H. 126. The court in the principal case, however, takes the ground that, where the conveyance is not a business transaction, the grantee is only entitled to be made whole. This appears to be analogous to the New Jersey rule, that a purchaser for value without notice of a note obtained by fraud can only recover what he paid for the note. *Holcomb* v. *Wyckoff*, 35 N. J. Law, 35. *Contra*, *Lay* v. *Wissman*, 36 Iowa, 305. There seems to be no sound reason for these exceptions to the fundamental rule, that a purchaser for value without notice takes free from equities. Such a purchaser from a fraudulent grantor must bear the loss, if the value of the property falls below the price he paid, and it is unfair to deprive him of a rise in value. The distinction made by the principal case is therefore inexpedient, and unsupported by authority in other states.

INSURANCE — BREACH OF CONDITION — DIVISIBLE CONTRACT. — Plaintiff insured his store and stock of goods for separate amounts, the premium being a gross sum on both. A clause of the policy provided that if an inventory should not be taken at a certain time, "this policy shall be null and void from that date." *Held*, that as the contract was indivisible, a breach of the stipulation voided the insurance on the building as well as on the stock of goods. *Southern Fire Ins. Co.* v. *Knight*, 36 S. E. Rep. 821 (Ga.).

Many courts conclude, with the principal case, that the payment of premiums in a gross sum and the use of the words "this policy" show an intention to make the contract indivisible. *McQueen* v. *Phœnix Ins. Co.*, 52 Ark. 257. But an almost equal number take the opposite view. *Coleman* v. *Ins. Co.*, 49 Ohio St. 310. In view of this direct conflict it seems proper to consider the purpose with which the words are used. Such stipulations are inserted because a greater risk is incurred without them. Hence it may well be held that a breach of the condition should prevent recovery on such of the insured items as are thereby made an increased risk. This construction

has been advantageously followed in at least one state, and seems to present a logical rule that can be applied to the varying circumstances of each case. *Phœnix Ins. Co.* v. *Pickel*, 119 Ind. 155; *Geiss* v. *Franklin Ins. Co.*, 123 Ind. 172. In the present case an increased risk on the stock would obviously be an increased risk on the building, and consequently the breach should avoid the policy *in toto*. *Pickel* v. *Phœnix Ins. Co.*, 119 Ind. 291.

INTERNATIONAL LAW — PRIZE — PLEDGE OF BILL OF LADING. — A Spanish subject shipped goods in a Spanish vessel and pledged the bills of lading to an English firm before war was declared between the United States and Spain. After the declaration of war the ship was captured by the United States. *Held*, that the pledge of the bill of lading does not make the goods neutral property so as to protect them from capture and sale as the property of the enemy. *The Carlos F. Roses*, 20 Sup. Ct. Rep. 803.

The status of enemy property, the bills of lading of which have been pledged to a neutral, seems never before to have arisen in a prize court. A neutral lien upon such property does not exempt the goods from capture. *The Tobago*, 6 Rob. 194; *The Battle*, 6 Wall. 498. The same is true of a mortgage. *The Hampton*, 5 Wall. 372. But it is recognized that a *bona fide* sale to a neutral does protect the property. *The Ariel*, 11 Moore P. C. 119. The principle upon which these cases rest seems to be that a prize court will not recognize a transfer as making the property neutral, if the loss resulting from condemnation will fall upon the enemy. *The Francis*, 1 Gall. 445, at 447. Loss will fall upon the enemy whenever the transfer is short of an absolute and *bona fide* sale, divesting all enemy interest. Since, therefore, a pledge, like a mortgage, is not such a sale, the principal case is undoubtedly correct.

INTERPRETATION OF STATUTES — DEATH BY WRONGFUL ACT — PERSON ENTITLED TO RECOVER. — A Georgia statute gave a remedy in cases of death by wrongful act to persons who were dependent upon the deceased or to whose support he contributed. Under this statute, a father who was earning enough to pay his own expenses, but who depended on his minor son by a former marriage to help support his second wife and children, sued for the son's death. *Held*, that he is not entitled to recover. *Georgia R. R. & Banking Co.* v. *Spinks*, 36 S. E. Rep. 855 (Ga.).

It is held in some jurisdictions that such statute should be construed liberally. *Haggarty* v. *Central R. R. Co.*, 31 N. J. Law, 349. This seems the better view, since they appear to be in the highest sense remedial, and on this ground the principal case is clearly wrong. The Georgia courts, however, have taken the position that they are harsh and punitory in nature, and so are to be construed strictly. *Smith* v. *Hatcher*, 102 Ga. 160. Nevertheless, the same courts have held that a mother can recover for the death of a son, when the father, mother, and children are mutually dependent. *Augusta Ry. Co.* v. *Glover*, 92 Ga. 132; *Daniels* v. *Savannah, etc. Ry. Co.*, 86 Ga. 236. The position of a father who is dependent on his son for a substantial part of his family expenses can hardly be differentiated from the facts in these cases. It is, therefore, difficult to support the principal case even accepting the narrow attitude of the court toward the statute.

PROPERTY — COVENANT FOR PARTY WALLS — SUIT BY VENDEE. — The plaintiff's vendor and defendant bought adjoining lots from a building estate at different times, each covenanting that, if use should be made by him of a party wall built by the owner of the adjoining estate, he would contribute one half of its value. *Held*, that the plaintiff is entitled to recover this amount upon user of such a wall by the defendant. *Irving* v. *Turnbull*, [1900] 2 Q. B. 129. See NOTES.

PROPERTY — EJECTMENT — DISSEISIN REQUISITE TO MAINTAIN ACTION. — The defendant street railway company without legal authority laid its tracks on a turnpike which crossed land which the plaintiff owned in fee. *Held*, that as the injury is not an injury to the plaintiff's possession, but an illegal user of the admitted easement of public travel, ejectment will not lie. *Becker* v. *Lebanon, etc. Ry. Co.*, 46 Atl. Rep. 1096 (Pa.). See NOTES.

PROPERTY — FRAUDULENT CONVEYANCES — EFFECT OF SETTING ASIDE. — A chattel mortgage on corporate property was made expressly subject to a prior chattel mortgage. This prior mortgage having been avoided by creditors as misappropriation of corporate property, *held*, that they have priority over the holder of the subsequent

mortgage to the amount covered by it. *Singer Piano Co.* v. *Barnard*, 83 N. W. Rep. 725 (Iowa).

If the effect of the creditors' action in avoiding the prior mortgage was to make the prior mortgagee a trustee for them, the decision would be clearly correct. But the better view is that the mortgage, when set aside, is to be regarded as no mortgage at all, and the property conveyed as having remained the property of the mortgagor. *Bethel* v. *Stanhope*, Cro. Eliz. 810; MAY, FRAUD. CONVEY., 58. It follows that, although the subsequent mortgagee could not himself have questioned the validity of the prior mortgage, yet when the creditors have avoided it, they should not be allowed thereafter to set it up against him. *Hibbard* v. *Cribb*, 80 Wis. 398 (*semble*). *Contra*, *Fox* v. *Willis*, 1 Mich. 321. Similarly, it is held that a wife joining with her husband in a fraudulent conveyance retains her dower, if the husband's creditors set the deed aside. *Robinson* v. *Bates*, 3 Met. 40. *Contra*, *Den* v. *Johnson*, 18 N. J. Law, 87 (*semble*). The principal case, therefore, seems wrong, though there is little authority on the precise point.

PROPERTY — GENERAL POWER — RIGHTS OF CREDITORS. — The donee of a general power of appointment exercised it by will. *Held*, that the appointed property cannot be reached by his creditors. *Humphrey* v. *Campbell*, 37 S. E. Rep. 26 (S. C.).

The present case is opposed to the authorities generally. *Townshend* v. *Windham*, 2 Ves. Sen. 1; *Clapp* v. *Ingraham*, 126 Mass. 200. These decisions rest on the principle that the donee of a general power is virtually *dominus* of the property, and that consequently an appointment by him to a volunteer, being equivalent to a conveyance of property, is, in case of insolvency, void as against his creditors. If not exercised, the power itself is not property which the creditors can reach. *Jones* v. *Clifton*, 101 U. S. 225. The court in the principal case relies on several earlier South Carolina cases. *Aaron* v. *Beck*, 9 Rich. Eq. 411; *Wilson* v. *Gaines*, 9 Rich. Eq. 420. These, however, decide merely that a woman who is given a life estate with a general power does not take an absolute interest which would on marriage vest in her husband. They do not, therefore, support the principal case, and it is to be regretted that the court did not come into line with the established doctrine.

PROPERTY — LATERAL SUPPORT — LIABILITY OF LESSEE. — *Held*, that neither the devisee of land nor his lessee is liable for damage to adjacent land through subsidence caused by excavations of the devisor, though occurring during the term of the lease. *Hall* v. *Duke of Norfolk*, [1900] 2 Ch. 493.

It was formerly considered that there was a right to the support of land analogous to an easement, for the violation of which an action would lie without actual damage. *Nicklin* v. *Williams*, 10 Ex. 259. This, however, has been overruled. *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503. It is also decided that each successive subsidence gives rise to a new and distinct cause of action. *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127. These cases seem hard to explain except on the ground that the excavation and the failure to fill it in or substitute other support constitute a continuous tort analogous to a nuisance. Nevertheless, a lessee is not liable for a nuisance until he has been requested to abate it. *Penruddock's Case*, 5 Co. 101. Accordingly, accepting the analogy, it appears that the defendants in the principal case should be held liable only after notice of the defective support, and a request to remedy it. As no such facts appear, the decision is correct, but the language of the court is broad enough to cover cases where a request is shown, and this position seems untenable. The only other case which has been found on the point reaches the same result on similar facts. *Greenwell* v. *Low Beechburn Coal Co.*, [1897] 2 Q. B. 165.

PROPERTY — PLEDGE — POSSESSION OF PLEDGEE. — An iron company borrowed money from A and agreed to pledge iron as security. The iron was placed on a particular spot of ground belonging to the iron company, which ground was tendered to A and accepted by him for his use. Later, without his knowledge or consent, the iron was removed and pledged to B, who had no notice of his claim. *Held*, that there is a sufficient possession in A to give him priority over B. *American Pig-Iron, etc. Co.* v. *German*, 28 So. Rep. 603 (Ala.).

To constitute a valid pledge, possession in the pledgee or his agent is indispensable. This is the distinguishing difference between a pledge and a mortgage. The pledgee's possession, moreover, must be exclusive of the pledgor's possession and control. *Casey* v. *Cavaroc*, 96 U. S. 467. It has been held, however, that there is a sufficient constructive delivery, though the goods remain on the premises of the pledgor, if they

are placed in the possession and control of one whose general relation to the pledgor is that of agent, but who in the particular transaction is the special agent of the pledgee. *Sumner* v. *Hamlet*, 12 Pick. 76. The principal case goes still farther, and would make the pledgor himself the agent of the pledgee. This is unjustifiable, for there must be an actual bailment, and the same person cannot be both bailor and bailee. At best the plaintiff had merely an equitable pledge, and his right must give way before the superior legal right of the subsequent innocent pledgee.

PROPERTY — REPLEVIN — POSSESSION. — A husband, as agent for his wife, loaded lumber belonging to her on the cars of a railroad. *Held*, that he could not maintain replevin for the goods, which were wrongfully removed by the railroad, since possession, in order to give a right of action, must be in one's own right, and not as agent. *Mitchell* v. *Georgia, etc. Ry. Co.*, 36 S. E. Rep. 971 (Ga.).

The court holds that the agent in possession is incapable of bringing the action, partly on the analogy of a case holding that a sheriff's deputy has not that power. *Ludden* v. *Leavitt*, 9 Mass. 104. That decision, however, rests upon a technical rule that the possession of a sheriff cannot be delegated, and that, therefore, the deputy has no possession. Moreover, it has been held on broader grounds in another jurisdiction that the deputy should be allowed to bring the action. *Poole* v. *Symonds*, 1 N. H. 289. This line of cases is, therefore, clearly insufficient to support the decision. The court also places its decision in part on the ground that a servant cannot sue in possessory actions. But even here, if the master has intrusted the servant with actual possession, as contrasted with mere custody, the latter should be treated as a bailee with the consequent right to sue. *Harris* v. *Smith*, 3 S. & R. 20. As the facts in the principal case clearly indicate a relation of agency coupled with such actual possession, the decision seems wrong.

SURETYSHIP — EVIDENCE — JUDGMENT AGAINST PRINCIPAL. — In an action against the sureties on an official bond, *held*, that a judgment against the officer is *prima facie* evidence against the sureties. *Barker* v. *Wheeler*, 83 N. W. Rep. 678 (Neb.).

This decision overrules earlier Nebraska cases in which such a judgment was held conclusive evidence. *Lewis* v. *Mills*, 47 Neb. 910. So far its correctness cannot be doubted, but it seems the court should have gone further, and held that the judgment was no evidence at all against the surety. On principle it is hard to perceive why the sureties should be affected by an action which they have no opportunity to defend. Clearly, they should be allowed to regard it as *res inter alios acta*. On the other hand, if this position is not adopted, it seems that the judgment should be conclusive against them. In any event, the middle ground here adopted cannot be supported on principle. BRANDT, SUR. § 630. It must be conceded, however, that perhaps the greater number of decisions are in accord with the principal case. *City of Lowell* v. *Parker*, 10 Met. 309; *Stephens* v. *Shafer*, 48 Wis. 54. Nevertheless, many well-reasoned American cases support the view here advocated, *Douglass* v. *Howland*, 24 Wend. 35; and such is the settled English doctrine. *Ex parte Young*, 17 Ch. 668.

TORTS — CORPORATIONS — LIABILITY FOR ULTRA VIRES ACT. — The defendant company was running cable cars under a charter authorizing them to use animal power only. One of these cable cars ran into and injured a car belonging to the plaintiff company. *Held*, that the defendant is not liable, in the absence of negligence. *Chicago General Ry. Co.* v. *Chicago City Ry. Co.*, 57 N. E. Rep. 822 (Ill.). See NOTES.

TORTS — DEATH BY WRONGFUL ACT — RELEASE BY PARTY INJURED. — The plaintiff's husband compromised an action against the defendant for a personal injury. The injury afterwards resulting in death, the widow sued under a statute allowing an action to be brought by the personal representatives of the deceased. *Held*, that the action is not maintainable. *Southern Bell Telephone Co.* v. *Cassin*, 36 S. E. Rep. 881 (Ga.). See NOTES.

TORTS — LIBEL — NEGLIGENT PUBLICATION. — The defendants circulated and sold books containing a libel on the plaintiff, although they did not know of the existence of the libel. The jury found that due care was not used in carrying on the business. *Held*, that these facts constitute a publication. *Vizetelly* v. *Mundie's Select Library, Ltd.*, [1900] 2 Q. B. 170.

The gist of an action of libel is injury to the plaintiff's reputation. ODGERS, LIBEL AND SLANDER. This is clearly present in the principal case, so the decision is correct. The court, however, differentiates the case of librarians and news-venders from other cases of libel, and places the decision on a ground as yet not considered by the American courts. Clearly, the voluntary act of such a person must technically be considered a publication of the libel, irrespective of his knowledge or ignorance of the fact that he is so doing. It is, however, evident that it is impossible for a librarian to examine every book or paper disseminated by him, and hence it may well be held that the general welfare requires the recognition of an excuse in such cases. This has become the settled English law. *Emmons* v. *Pottle*, 16 Q. B. 354; *Martin* v. *Trustees of British Museum*, 10 Times L. R. 338. But the argument of public policy breaks down when, as in the principal case, the jury finds negligence on the part of the defendant. The decision is, therefore, in accord with the earlier cases.

TORTS — SLANDER — SUIT BY CORPORATION. — The defendant slandered the general manager and treasurer of the plaintiff corporation without directly referring to his connection with the corporation. *Held*, that the corporation could not maintain an action for an implied slander, nor recover for consequential injuries to its trade resulting from the defamation of its officer. *Brayton* v. *Cleveland Special Police Co.*, 57 N. E. Rep. 1085 (Ohio). See NOTES.

TRUSTS — CUSTODY OF RES — NEGOTIABLE SECURITIES. — The defendant trustees were authorized to keep a part of the testator's property in the form of railroad bonds payable to bearer. *Held*, that they may properly deposit such bonds with a bank in their joint names, with authority to the bank to remove the coupons and receive dividends. *In re De Pothonier*, [1900] 2 Ch. 529.

The rule is well settled that trustees need exercise only the care of prudent men of business in caring for the trust *res*. *Speight* v. *Gaunt*, 9 App. Cas. 1; *Taylor* v. *Hite*, 61 Mo. 142. But within this rule there is considerable latitude, and the present case is valuable in making the limits more definite. An earlier English case held it to be no breach of trust where a box containing the securities was deposited at a banker's, and one of the trustees kept the key for the purpose of removing coupons. *Mendes* v. *Guedalla*, 2 J. & H. 259. A strong *dictum*, however, in a more recent case seemed to indicate that the trustees must retain exclusive joint control. *Field* v. *Field*, [1894] 1 Ch. 430. This view is expressly negatived in the principal case, and a far more liberal rule laid down. As the opinion points out, the trustees can hardly be expected to be present on each occasion to remove coupons. The method approved here certainly provides all reasonable security, and is more in keeping with ordinary business methods. The case will, therefore, probably be followed.

TRUSTS — EXECUTORS' SALE — PURCHASE BY WIFE. — Land was devised to an executor in trust to sell and apply the proceeds to various uses. At a properly conducted public sale, the wife of the executor bid in the property for an apparently adequate price, which she paid out of her separate estate. There was no evidence of actual fraud. *Held*, that the sale passes a sound and marketable title. *Miller* v. *Weinstein*, 52 N. Y. App. Div. 533.

Before the Married Women's Property Acts, the rule that a trustee or agent empowered to sell gives only a voidable title if he becomes directly or indirectly interested in the purchase was applied without question to a purchase by the wife of the fiduciary, even for her separate estate. *Davoue* v. *Fanning*, 2 Johns. Ch. 252. But in the principal case the court argues that since the wife may now contract without the consent of her husband and he has no right or interest in her real estate, there is no longer any reason for attacking a *bona fide* purchase on her part. The true reason for the limitation on the power of the trustee, however, seems to be that the law will not allow him to be placed in a position where he is tempted to sacrifice the interests of the beneficiary. A purchase by the wife is objectionable, simply because the relations between husband and wife are so close that her interest is ordinarily as strong a temptation to the trustee as his own. The rule is therefore not affected by the change in her legal status. The weight of authority supports this view in opposition to the principal case. *Bassett* v. *Shoemaker*, 46 N. J. Eq. 538; *Tyler* v. *Sanborn*, 128 Ill. 136.

TRUSTS — INDEBITATUS ASSUMPSIT — PRIVITY. — X contracted to convey certain land to plaintiff, subject to a mortgage, which was afterward foreclosed before conveyance to plaintiff. The proceeds of the foreclosure sale exceeded the mortgage

debt, and the surplus remained in the hands of the mortgagee's attorney. *Held*, that since the plaintiff was equitably entitled to the payment of the surplus proceeds he could recover them from the attorney in an action for money had and received. *Rushton* v. *Davis*, 28 So. Rep. 476 (Ala.).

To the general rule that a right equitable in its nature cannot be enforced by an action at law, there are two established exceptions. Where the old action of account would have lain to enforce what was substantially a trust, or where a wrongdoer becomes a constructive trustee for the person injured, *assumpsit* for money had and received is allowed. *Hancock* v. *Franklin Co.*, 114 Mass. 155; *Staat* v. *Evans*, 35 Ill. 455. These cases are rather anomalous, but in all there is a clear duty, though an equitable one, owing directly from the defendant to the plaintiff, on which to found the implied promise which is the basis of *indebitatus assumpsit*. In the principal case there is no such duty, since defendant's obligation was not to X, but to the mortgagee alone, and the total lack of privity should have been fatal to the action. *Robbins* v. *Fennell*, 11 Q. B. 248. In several American cases, however, where the depositor of a note for collection sued the sub-agent bank on the failure of the bank of deposit, the necessity of privity has been denied or ignored. *Metropolis Bank* v. *First Bank*, 19 Fed. Rep. 301.

REVIEWS.

THE RIGHTS, DUTIES, REMEDIES, AND INCIDENTS BELONGING TO AND GROWING OUT OF THE RELATION OF LANDLORD AND TENANT. In two volumes; with forms. By David McAdam, one of the Justices of the Supreme Court of the State of New York. Third edition. New York: Remick, Schilling & Co. 1900. pp. xiii, 856; x, 857–1768.

It is a long step from the first edition of Judge McAdam's Landlord and Tenant, which appeared in 1876 and consisted of four hundred pages, to the two compendious volumes now before us. The general scope and plan of the work is still much the same, nevertheless, as in the two prior editions. The present edition, however, is far more valuable than its predecessors, for not only does it bring down to date a branch of the law which is constantly being modified by statutory changes, but it also presents a much fuller discussion of the subjects treated and a broader field of quotations and references. The text of the book has in many places been entirely rewritten, and everywhere considerably expanded. The author considers his subject of landlord and tenant with great thoroughness and from various points of view. A discussion of the topics, among others, of tenure in general, leases, their validity, termination, assignment, and renewal, covenants, forfeiture, fixtures, emblements, and the doctrine of agency make up the first volume. In the second volume the chief subjects considered are principal and surety, rights and remedies of the landlord, trespass, easements, excavations, party walls, nuisance, waste, repairs, surrender, eviction, rights and remedies of the tenant, remedies of legal representatives, and distress. A collection of forms of leases, covenants, etc, with an index and a table of cases, complete the volume. The statement of the law on any particular point is accurate and concise, and is fully illustrated by references to and quotations from decided cases. The book does not often go deeply into theoretical discussions, but only gives an adequate statement of what the law is. This method, although it may not always be of great help to the student, satisfies the need of the lawyer — and it is for the practitioner that the book